

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

**IN RE TRANSPACIFIC PASSENGER
AIR TRANSPORTATION
ANTITRUST LITIGATION**

Civil Case No. 3:07-cv-05634-CRB

MDL No. 1913

This Document Relates To:

ALL ACTIONS

**[PROPOSED] ORDER GRANTING
PLAINTIFFS' MOTION FOR SECONDARY
DISTRIBUTION OF REMAINING
SETTLEMENT FUNDS AND REQUEST
FOR ATTORNEYS' FEES AND
REIMBURSEMENT OF EXPENSES**

1 This litigation has been completely settled since December 2019 when the Court granted
 2 final approval of the last settlement (ECF No. 1318) and entered a final judgment as to the last
 3 Defendant (ECF No. 1319). In the approximately two years after that, the claims administrator,
 4 Rust Consulting, Inc. (“Rust”), processed settlement class members’ claims to the settlements and
 5 made an initial distribution of the net settlement funds on March 17, 2022. Plaintiffs now seek
 6 entry of an order authorizing a secondary distribution of the remaining uncashed net settlement
 7 funds, additional claims administration expenses, and further attorneys’ fees and reimbursement
 8 of expenses in connection with settlement administration.

9 The Court, having reviewed Plaintiffs’ Notice of Motion and Motion for Secondary
 10 Distribution of Remaining Settlement Funds and Request for Attorneys’ Fees and Reimbursement
 11 of Expenses (“Motion”) (ECF No. 1347), the objections by Corp Xanadu, David Gould, and Kelly
 12 Overvold (together, “Objectors”) (ECF Nos. 1353, 1357), Plaintiffs’ reply in support of the
 13 Motion (ECF No. 1356), Plaintiffs’ notices regarding Corp Xanadu’s claim, including Rust’s final
 14 determination as to Corp Xanadu’s claim (ECF Nos. 1370, 1371, 1374), and the Court’s files and
 15 records in this matter, hereby finds that the relief requested is appropriate.

16 Accordingly, it is hereby ORDERED and DECREED that:

- 17 1. The Court authorizes a holdback of \$50,000 for Claimant Michael Chekian;¹
- 18 2. The Court overrules the objections by Objector Corp Xanadu because Corp
 19 Xanadu did not establish that it had any qualifying purchases. In failing to do so, therefore, not
 20 only has it failed to establish that it is entitled to share in the settlement proceeds, but it has also
 21 failed to establish that it is a settlement class member. Courts considering class action settlements
 22 must verify that every class member has standing, and it is the class member’s burden to establish
 23 standing. *In re Volkswagen “Clean Diesel” Mktg.*, No. 15-MD-02672-CRB, 2022 WL 17730381,
 24 at *1 (N.D. Cal. Nov. 9, 2022) (citing *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207–08
 25 (2021)). Non-class members have no standing to object to the settlement of a class action. *Clean*
 26

27 ¹ See Tr. of Remote Zoom Video Conference Proceedings 14:17-18, 16:1-3 (Nov. 4, 2022) (ECF
 28 No. 1347).

1 *Diesel*, 2016 WL 6248426, at *22 (N.D. Cal. Oct. 25, 2016), *aff'd sub nom. Clean Diesel*, 895
 2 F.3d 597 (9th Cir. 2018), and *aff'd sub nom. Clean Diesel*, 741 F. App'x 367 (9th Cir. 2018).

3 3. Corp Xanadu (claim number 0000144970) filed a claim to the settlements in this
 4 litigation. Rust audited Corp Xanadu's claim because the audit threshold established for
 5 businesses was 1,000 or more tickets. Corp Xanadu did not support any of its claimed ticket
 6 purchases with actual invoices or other corporate records. Instead, Corp Xanadu's alleged 1,337
 7 claimed tickets are supported by a one-page Affidavit, executed by the alleged Secretary of Corp
 8 Xanadu, Carlos Suica, on October 2, 2020 in response to Rust's September 20, 2020 audit letter.
 9 On September 30, 2022, at the direction of the Court (ECF No. 1358) and the request of Class
 10 Counsel, Rust requested additional documentation or information from Corp Xanadu to establish
 11 the legitimacy of its claim.

12 4. Rust has now completed reviewing the documents and information that Corp
 13 Xanadu provided by November 30, 2022 and has made a determination on Corp Xanadu's claim
 14 (ECF No. 1374). Specifically, Rust determined "there is \$0 due in settlement benefits" to Corp
 15 Xanadu based on numerous factors, including, but not limited to:
 16

- 17 (a) The 144 American Airlines itineraries that Corp Xanadu provided for
 18 claimed ticket purchases between the dates of July 2015 and August 2015
 19 did not verify that Corp Xanadu was the payor of the foregoing claimed
 20 ticket purchases. Thus, even though those purchases fell within a
 21 qualifying period for the settlement classes, Corp Xanadu provided no
 22 documentation (*e.g.*, bank statements) that it paid for such purchases²;
 23
 24

25 ² Rust noted that Corp Xanadu redacted the name of the payor from all itineraries that it provided
 26 to Rust, which the Court finds to be inconsistent with Corp Xanadu's obligation to demonstrate
 27 that it was the purchaser of these tickets. *See Miller v. Ghirardelli Chocolate Co.*, No. 12-CV-
 28 04936-LB, 2015 WL 758094, at *10 (N.D. Cal. Feb. 20, 2015) (holding that three objectors lacked
 standing to challenge settlement because none had purchased the defendant's product and suffered
 injury).

- 1 (b) During an interview with Rich Sutton, Corp Xanadu's CEO, he informed
2 Rust that the documents used to determine the number of tickets claimed
3 for American Airlines and the other airlines were destroyed. Without this
4 information, Rust was unable to verify the methodology used to determine
5 the number of ticket purchases claimed;
- 6 (c) Rust requested, but Corp Xanadu did not provide, the date when the
7 foregoing documents were destroyed and information to explain the
8 difference in the records maintained for the years 2002 – 2008 and 2009 –
9 2015, including the names of the employees that maintained the records
10 for these two time periods. Accordingly, Rust was not able to verify that
11 the documentation ever existed to substantiate the ticket purchases
12 claimed;
- 13 (d) Aside from the claimed purchases on American Airlines, Corp Xanadu
14 provided no documentation of purchases for any travel on other qualifying
15 airlines to substantiate its claim;
- 16 (e) Rust also asked Corp Xanadu to provide any marketing material and/or
17 magazine ads for Corp Xanadu services to confirm the nature of Corp
18 Xanadu's business, which Corp Xanadu never provided; and
- 19 (f) After Mr. Sutton represented that Corp Xanadu never owned any property
20 in the United States, including vehicles, Rust asked Corp Xanadu to
21 explain why it filed a claim and received a settlement payment in *In re:*
22 *Parking Heaters Antitrust Litigation* in 2019 (this indirect purchaser
23 plaintiff settlement, which Rust administered, paid monies to those who
24 purchased an aftermarket parking heater for their commercial vehicles
25 between October 1, 2007 and December 31, 2012). Corp Xanadu did not
26 provide any explanation.
27
28

1 5. In summary, Rust determined that Corp Xanadu is not a settlement class member
2 because it does not have any valid claim to the net settlement funds. As Corp Xanadu is not a
3 settlement class member, the Court need not consider its objections.

4 6. The Court will nevertheless address the merits of all objections raised. The Court
5 overrules the objections by Objectors Corp Xanadu, David Gould, and Kelly Overvold for several
6 reasons:

7 (a) First, the Objectors received notice of the proposed secondary distribution
8 and filed objections, directly contradicting their argument that Plaintiffs
9 and Rust failed to provide reasonable notice of such distribution.
10 Furthermore, Class Counsel already provided notice of each of the three
11 rounds of settlements, which the Court approved (ECF Nos. 1009, 1259-1,
12 1318). There is no authority for the proposition that a comprehensive notice
13 program pursuant to Federal Rule of Civil Procedure 23 is required when
14 Class Counsel and the Court are simply seeking to redistribute uncashed
15 settlement funds as part of the claims administration process. *See, e.g., Six*
16 *(6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1307 (9th
17 Cir. 1990) (“Federal courts have broad discretionary powers in shaping
18 equitable decrees for distributing unclaimed class action funds.”);
19 *Keepseagle v. Vilsack*, 118 F. Supp. 3d 98, 117 (D.D.C. 2015) (noting that
20 “as a general matter, ‘a court’s goal in distributing class action damages is
21 to get as much of the money to the class members in as simple a manner as
22 possible’”);

23
24 (b) Second, the Objectors received notice of Plaintiffs’ request for attorneys’
25 fees and reimbursement of expenses and filed objections, directly
26 contradicting their argument that Plaintiffs failed to provide reasonable
27 notice of such request. Moreover, Class Counsel already provided
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reasonable notice to settlement class members of their fee requests in connection with each of the three rounds of settlements (ECF Nos. 986, 1227, 1307), and the deadlines to object to these requests have long passed. The pending request for attorneys’ fees and reimbursement of expenses relates to Class Counsel’s lodestar and expenses in connection with settlement administration between August 1, 2019 and July 31, 2022. Additionally, this Court invited Class Counsel to submit this request. Hr’g Tr. at 9:12-16 (Jul. 6, 2022). The amount of fees requested fall below the amount described in the settlement notice for the prior settlement round;³

- (c) Third, given the amount of the remaining uncashed settlement funds (*i.e.*, \$5,448,087.41), the Objectors’ contention that such funds should escheat to the states is unsupported in the Ninth Circuit and in class actions generally—and is nowhere to be found in any of the settlement agreements at issue. *See Hester v. Vision Airlines, Inc.*, No. 2:09-CV-00117-RLH, 2017 WL 4227928, at *2 (D. Nev. Sept. 22, 2017) (“[r]edistribution of unclaimed class action funds to existing class members is proper and preferred” because it “ensures that 100% of the [settlement] funds remain in the hands of class members” and because “class settlements rarely ‘pay individual class members the full value of their claims’”); William B. Rubenstein, *Newberg on Class Actions*, § 12:30 (5th ed.) (“Redistribution is more likely to bring the class members closer to that value rather than to be a windfall.”).

³ Class Counsel requested attorneys’ fees of 33%, and the Court granted 25%, in connection with the third and final round net settlement fund (ECF Nos. 1307 at 1 (motion), ECF No. 1314 at 14 (order)). The Court’s award here of additional attorneys’ fees of \$1 million, or 18.355%, from the remaining settlement funds of \$5,448,087.41, results in a fee award of 26.77% in connection with third and final round net settlement fund (*i.e.*, less than the 33% noticed).

7. Having addressed the holdback for Mr. Chekian and the objections by Corp Xanadu, David Gould, and Kelly Overvold, the Court grants the Motion.

8. The Court authorizes reimbursement of additional claims administration expenses totaling \$125,921.00 in connection with Rust's anticipated work through the secondary distribution and a *cy pres* distribution, if necessary, at the end of the litigation.

9. The Court authorizes reimbursement of incurred litigation expenses totaling \$4,876.85 in connection with Class Counsel's settlement administration work from August 1, 2019 through July 31, 2022.

10. The Court awards attorneys' fees totaling \$1 million in connection with Class Counsel's settlement administration work from August 1, 2019 through the secondary distribution and a *cy pres* distribution, if necessary, at the end of the litigation.

11. The Court directs Plaintiffs to pay the awarded fees and expenses from the remaining settlement funds of \$5,448,087.41.

12. The Court authorizes a secondary distribution of the remaining settlement funds of \$5,448,087.41 less the holdback of \$50,000 for Mr. Michael Chekian, less the additional claims administration expenses of \$125,921.00 for Rust and reimbursement of litigation expenses of \$4,876.85 for Class Counsel authorized by the Court above, and less the attorneys' fees of \$1 million for Class Counsel awarded by the Court above.

13. If there are any further remaining settlement funds after the secondary distribution, assuming such funds will be economically infeasible to distribute, Plaintiffs shall propose an appropriate *cy pres* recipient with approval from the Court after the check void date for this secondary distribution. At that time, Class Counsel will also provide an update to the Court regarding the final resolution of Mr. Chekian's claims.

IT IS SO ORDERED.

Dated: _____

HON. CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE